NO. 46120-0-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

LESTER RILEY and SUSAN K. RILEY, husband and wife,

Plaintiffs/Appellants,

vs.

DAVID VALAER and SUSAN E. VALAER, husband and wife,

Defendants/Respondents,

DAVID VALAER,

Third Party Plaintiff,

v.

U.S. DEPARTMENT OF TREASURY; LEE ROBBINS and JANE DOE ROBBINS, and their marital community thereof,

Third Party Defendants.

APPEAL FROM THE SUPERIOR COURT

HONORABLE BARBARA JOHNSON

REPLY BRIEF

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pm 8/25/14

Table of Contents

Table of Authorities

Cases

INTRODUCTION

This Reply Brief will be limited to responding to the arguments made by Defendants and Respondents David and Susan Valaer (the Valaers) in the Brief of Respondents. It will avoid repeating points made in the Brief of Appellants and will instead refer the reader to the appropriate portion of that brief.

DISCUSSION

I. The Valaers Have Not Produced Any Evidence of an Agreement Concerning the Boundary Line to Support the "Common Grantor" Doctrine.

The parties agree that the "Common Grantor" doctrine requires the following two elements:

1. An agreed boundary established between the common grantor and the original grantee; and

2. Placement of improvements such that a visual examination of the property would indicate to subsequent purchasers that the deed line was no longer functioning as the true boundary.

(Brief of Appellants, p. 8; Brief of Respondents, p. 6) Plaintiffs/appellants Lester Riley and Susan Riley (the Rileys) pointed out that there was no evidence to support the first element, the existence of an agreement concerning the boundary line. In response, the Valaers point to the conduct

of Fred Neth and Alice Neth and the Rileys' grant of a deed of trust to Argent Mortgage. Neither satisfies the requirement of an agreement.

The Valaers state that the Neths recognized a new boundary in 1951 because they purchased the West Lot.[1] The action of buying the West Lot does not amount to an agreement between the Neths and any subsequent grantee.

Contrary to the arguments that the Valaers have made, the subsequent sale by the Neths to LaVern Boespflug and Elaine Boespflug (the Boespflugs) in 1971 does not amount to an agreement. There is no evidence that the parties agreed to any boundary line between the two lots. This is not surprising because the Neths sold both the East Lot and the West Lot to the Boespflugs. There was no reason for any discussion of boundary between the two parcels.

The Valaers also point to the Rileys' application to short subdivide the West Lot. First of all, the preliminary plat that the Rileys provided clearly showed the property line to the east of the lots that were going to be divided. (CP 199-200) Furthermore, a short subdivision proposal is just that. It is not an agreement with a grantee about a boundary line. In fact, there is no evidence that the Rileys ever showed this proposed short

[1] The Valaers claim that the Neths bought the West Lot to resolve a problem created by their home encroaching on the West Lot. There simply is no evidence to that effect in the record.

subdivision to anyone who was contemplating buying either parcel. It certainly wasn't presented to Argent Mortgage Company, LLC (Argent Mortgage) when the Rileys borrowed money and gave a deed of trust in 2004. The short subdivision application was made in 2007, more than three years. (CP 189) In any event, the Rileys did not go through with that short subdivision.

Finally, the Valaers point to the following language in the Rileys' deed of trust to Argent Mortgage:

> This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions, and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, the power of sale, the following described property located in the County of Clark:
>
> Lot 1, Block 3, SUNSET VIEW ADDITION TO THE CITY OF VANCOUVER, according to the plat thereof, recorded in Book "D" of Plats, page 101, records of Clark County, Washington.
> TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances and fixtures now or hereafter a part of the property. . .

(CP 413-424) This language is clear. Lot 1 of Block 3 is the East Lot. Argent Mortgage was taking all of the improvements on Lot 1. This language has nothing to do with whatever the boundary might be between the two parcels. This language simply does not address the boundary line

between the East Lot and the West Lot. It cannot be read to grant a security interest in any improvement to the extent that it is located on the West Lot.

The language of a deed of trust must be interpreted to effectuate the parties' intentions. Those intentions must be derived from the four corners of the instrument and its language. *Hanson Industries, Inc. v. County of Spokane*, 114 Wn.App. 523, 527, 58 P.3d 910 (2002); *Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn.App. 56, 64, 277 P.3d 18 (2012). The words within a deed must be given their ordinary meaning. *McKillop v. Crown Zellerbach, Inc.*, 46 Wn.App. 870, 873, 733 P.2d 559 (1987). The plain language of the deed of trust given to Argent Mortgage grants a security interest only on improvements to the extent that they are on the East Lot — nothing more and nothing less.

Finally, the Valaers argue that the agreement is made out by the inability of the Neths and the Rileys to remove the encroachments from the West Lot. Once again, that ability does not amount to an agreement between a common grantor and subsequent grantee to set the boundary.

In conclusion, the Valaers simply have not pointed to any agreement between a common grantor and any subsequent grantee to set

the boundary in any particular location. The "Common Grantor" doctrine therefore does not apply.

II. The Trial Court Improperly Designated the Land to Be Given to the Valaers.

The trial court established the retaining wall between the East Lot and the West lot as the new boundary. As pointed out in the Brief of Appellants, pps.12-13, any revision to the boundary line is limited to the area where encroachments sit. This is consistent with the holding of *Arnold v. Melani, infra,* where the Court's relief was limited to establishing an easement to maintain the encroachments limited to the area covered by the encroachments. 75 Wn.2d at 153. The Valaers haven't refuted that rule. Rather, they claim that the retaining wall is a qualifying improvement. (Brief of Respondents, pps. 10-11) But the retaining wall is an improvement associated with the West Lot not the East Lot. Its purpose is to keep dirt off of the West Lot. It does not serve as a boundary. (CP 508)

In short, any land that the Valaers receive from the West Lot must be limited to encroaching garage.

III. Genuine Issues of Material Fact Exist Concerning the "Liability Rule."

The parties agree that establishing entitlement to take property under the "Liability Rule," requires that each of the following elements be proven by clear, cogent, and convincing evidence:

1. The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully, or indifferently locate the encroaching structure;

2. The damage to the land owner was slight and the benefit of removal equally small;

3. There is ample remaining room for a structure suitable for the area and no real limitation on the property's future use;

4. It is impractical to move the structure as built; and

5. There is enormous disparity in resulting hardships.

Arnold v. Melani, supra; *Proctor v. Huntington*, 169 Wn.2d 491, 500, 238 P.3d 1117 (2010).

The Valaers assert that the evidence favors their position. That is not the question here, however. The trial court rendered its decision on summary judgment. The test is first whether the Valaers have made enough of a showing to demonstrate the presence of each of these elements by clear, cogent, and convincing evidence and second whether any genuine issue of material fact remains on these questions. As

discussed in the Brief of Appellants, pps. 15-18, a sufficient showing has not been made, and genuine issues of material fact do exist.

The Valaers claim that the first element is satisfied because they did not create the encroachment themselves. They allege that the Neths created the encroachment by building their house over the property line. No reason is given why this occurred. The Valaers have certainly not ruled out the Neths' being negligent in their location of the garage and patio. The Valaers were also negligent in failing to do any due diligence before they bought the property at the foreclosure sale in 2010. For these reasons, the Valaers haven't shown the absence of a question of fact on the first element.

The Valaers argue that the second element — damage to the Rileys is small and benefit of removal is also small — is satisfied because the Rileys lived in the residence and sought short subdivision approval. The Rileys' living in the residence is not meaningful. When they lived there, they had the benefit of both lots. The land use determination is not helpful also because the Valaers have not accompanied it with any opinion concerning the reduction in value of the West Lot if the boundary line is redrawn.

The Rileys may be able to build something on the West Lot even if the Valaers get the land they want. But will what they build have a lesser

value if the Valaers receive the strip of land they want? If so, what will the reduction in value be? The Valaers have not answered those questions. Until they do, there can be no finding by clear, cogent, and convincing evidence that the third element — ample remaining room on the West Lot and no real interference with its use — has been satisfied.

The final two elements concern relative hardships. It must be impractical to move the encroachments and there is "enormous disparity in the resulting hardships." The Valaers claim that it will be impractical to demolish and remove the retaining wall. The Rileys have no intention of doing so. That wall benefits the West Lot by keeping out material on the East Lot. The relative hardship of dealing with garage can only be assessed when evidence has been presented concerning the value of the strip that the Valaers are claiming and the cost to deal with the encroaching garage in some fashion. No such evidence has been produced. This lack of evidence must be contrasted to the more than $300,000.00 necessary to remove the structure in *Proctor v. Huntington, supra,* and the Court's finding—presumably based on evidence in the record—that the cost of dealing with the encroachments would far exceed the value of the property on which the encroachment sat in *Arnold v. Melani, supra.* It must also be remembered that whatever the Rileys build must be five feet from any

property line. VMC 20.410.050(B)[2] That will also affect the Rileys ability to use the West Lot.

A party moving for summary judgment must present sufficient evidence to show that it is entitled to judgment as a matter of law. The party must also show the absence of any genuine issue of material fact. (Brief of Appellants, pps.6-7) The Valaers simply have not sustained that burden.

CONCLUSION

The trial court erred in granting summary judgment to the Valaers and in quieting title in the disputed strip to them. The Court should reverse the judgment quieting title. It should also rule that the common grantor doctrine does not apply in this situation. It should direct a trial on all issues related to the "Liability Rule." Finally, it should rule that if the Valaers are entitled to any land on the West Lot, that land must be limited to encroachments that do not include the retaining wall.

DATED this 25 day of August, 2014.

BEN SHAFTON, WSB #8620
Of Attorneys for The Rileys

[2] This ordinance applies to the West Lot. The Court may take judicial notice that it is zoned R-9. *CLEAN v. State,* 130 Wn.2d 782, 809, 928 P.2d 1054 (1996)

APPENDIX

Section 20.410.050 Development Standards.

A. Compliance Required. All developments must comply with:

1. All of the applicable development standards contained in the underlying zoning district, except where the applicant has obtained a variance(s) in accordance with Chapters 20.290 VMC.

2. All other applicable standards and requirements contained in this title.

B. Development standards. Development standards in low-density residential zoning districts are contained in Table 20.410.050-1. These apply to all primary dwellings and accessory buildings on the site. For additional regulations governing accessory buildings, see Chapter 20.902 VMC.

Table 20.410.050– 1
Development Standards in Lower-density Residential Zones

STANDARD	R-2	R-4	R-6	R-9
Minimum Lot Size[5]	20,000 sf	10,000 sf	7,500 sf	5,000 sf
Maximum Lot Size	30,000 sf	19,000 sf	10,500 sf	7,400 sf
Maximum Lot Coverage	50%	50%	50%	50%
Minimum Lot Width[5]	100'	80'	50'	45'
Minimum Lot Depth[5]	100'	90'	90'	65'
Minimum Setbacks				
Front yard	10'	10'	10'	10'
Rear and through yards [4]	5'	5'	5'	5'
Side yard	10'	7'	0' [1]5' [2]	0' [1]/5' [2]
Street side yard	10'	10'	10'	10'
Garage/Carport from public/private street right of way or sidewalk easement	20'	20'	18'	18'
Garage/Carport from alley[3]	15'	10'	5'	5'
Maximum Height	35'	35'	35'	35'
Minimum Off-Street Parking Spaces	1	1	1	1
Minimum Landscaping Requirement (percentage of total net area)	10%	10%	10%	10%

[1] Subject to Chapter 20.910.050 VMC.

[2] For each additional 10 feet of building height, or fraction thereof, over 25 feet, add 2 feet to the setback to a maximum of 10 feet on each side or rear yard.

[3] There must be a minimum of 20' maneuvering space from entrance edge of the carport or garage to opposite edge of the alley.

[4] A through lot will be treated as an interior rear yard, especially with respect to placement of principal and accessory structures, location of parking and height of fences only when there is no vehicular access to the abutting street. If access occurs then the through lot yard will be treated in all respects as a front yard.

[5] Smaller lot sizes and dimensions may be allowed subject to VMC 20.920, Infill Development Standards.

C. Institutional development standards. Institutional uses such as colleges, schools, religious institutions, and emergency services facilities that locate within Low-Density Residential Districts shall comply with the following development standards:

1. For portions of an institutional campus abutting residentially-zoned property (not separated by a street):

a. Minimum setback: 35 feet.

b. Maximum height: 35 feet at the setback increasing one foot for every one foot of additional setback to a maximum of 75 feet.

c. Minimum landscaped buffering between the institutional use and residential development: 15 feet.

2. The development standards in subsection (1) above do not apply to existing buildings.

3. All other development standards on the institutional campus are the same as those in the underlying base zone except as follows:

a. Modified through a variance procedure per the requirements of Chapter 20.290 VMC alone or in conjunction with a Conditional Use procedure per the requirements of Chapter 20.245 VMC; or

b. Established as part of a Public Facilities Master Plan procedure per the requirements of Chapter 20.268 VMC.

D. Criteria for institutions as limited uses. As noted in Table 20.410.030–1 above, a school, religious institution, government building, fire station, child care center or emergency services facility is allowed as a limited use if it meets all of the criteria described below. An institution that does not comply with all of these criteria must be reviewed as a conditional use, except for school modular classrooms, which shall be permitted outright.

1. The site contains no more than 12 acres for an elementary school, not to exceed 75,000 gsf.

2. The site contains no more than two acres for a religious institution, not to exceed 30,000 gsf.

3. The site contains no more than one acre for a child care center, not to exceed 10,000 gsf.

4. The site takes its primary access from no less than a minor arterial.

5. If a religious institution also has a private elementary school, the total development shall not exceed 60,000 gsf and seven acres.

E. Criteria for Parks/Open Space as limited uses (Reserved for future use)

F. Criteria for Placement of Manufactured Homes.

1. General Provisions:

a. Manufactured homes are permitted on individual lots in the R-2, R-4, R-6, and R-9 residential zones in accordance with the placement standards as set forth in this section and other provisions which apply to conventionally built dwellings.

b. Nothing in these provisions shall be interpreted as superseding deed, covenants, or restrictions which are generally not enforced by the city.

c. Existing manufactured home developments and manufactured home subdivisions are permitted and are not subject to the provisions of this chapter. An existing manufactured home in a development or subdivision may continue to lawfully exist and be replaced or can be relocated either to an approved manufactured home development or an approved manufactured home subdivision.

d. A new manufactured home placed on an individual lot subsequent to the adoption of this ordinance, may be relocated as permitted by this title if within (5) five years of the date of the original placement.

2. Manufactured Home Placement Standards:

Except as allowed in subsections 1c and 1d above, all manufactured homes placed within the City of Vancouver shall comply with the following standards:

a. Manufactured homes must meet the development standards of the base zone unless otherwise noted.

b. The manufactured home must meet the definition of a "new manufactured home", unless otherwise noted. A new manufactured home means any manufactured home required to be titled under Title 46 RCW, which was not titled to retail purchaser before July 1, 2005, and was not a "used mobile home" as defined in RCW 82.45.032.9

c. The manufactured home must meet the requirements of a "designated manufactured home". Provided that manufactured homes built to 42 USC Section 5401-5403 standards (as amended in 2000) must be regulated in the same manner as site built homes.

d. The manufactured home must meet the following requirements

1. Is comprised of at least two fully enclosed parallel sections each of not less than twelve feet wide by thirty-six feet long;

2. Was originally constructed with and now has a composition or wood shake or shingle, coated metal, or similar roof of not less than 3:12 pitch;

3. Has exterior siding similar in appearance to siding materials commonly used on conventional site – built building code single-family residences;

e. The manufactured home must comply with all local design standards applicable to all other homes within the neighborhood in which the manufactured home is to be located

f. The manufactured home be set on permanent foundation, as specified by the manufacturer, and that the space from the bottom of the home to the ground be enclosed by concrete or an approved concrete product which can be either load bearing or decorative.

g The manufactured home must be thermally equivalent to the state energy code.

3. Review and Inspection:

a. City will review building permit applications and will issue appropriate zoning and building permits and conduct the installation inspection.

b. The Department of Labor and Industries is responsible for inspections including replacement, addition, modification, or removal of any equipment or installation and issuing permits under RCW Chapter 43.22.

(M-4066, Amended, 12/16/2013, Sec 5; Effective 01/16/2014; M-3959, Amended, 07/19/2010, Sec 24-Effective 8/19/2010; M-3931, Amended, 11/02/2009, Sec 11-Effective 12/02/2009; M-3922, Amended, 07/06/2009, Sec 20; M-3840, Amended, 08/06/2007, Sec 19; M-3709, Amended, 06/20/2005, Sec 5; M-3701, Amended, 05/02/2005, Sec 14; M-3663, Amended, 08/02/2004, Sec 13; M-3643, Added, 01/26/2004)

NO.

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AFFIDAVIT OF SERVICE

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STATE OF WASHINGTON)
) ss.
County of Clark)

THE UNDERSIGNED, being first duly sworn, does hereby depose and state:

1. My name is LORRIE VAUGHN. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.

2. On August 25, 2014, I hand delivered, a copy of the REPLY BRIEF to the following person(s):

Mr. Albert Schlotfeldt
Duggan Schlotfeldt & Welch
900 Washington Street, Suite 1020
Vancouver, WA 98660

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED this 25th day of August, 2014.

Lorrie Vaughn
LORRIE VAUGHN

SIGNED AND SWORN to before me this 25th day of August, 2014.

BEN SHAFTON NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXP. SEPT. 1, 2015

NOTARY PUBLIC FOR WASHINGTON
My appointment expires: 9.1.15